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IN THE

Supreme Court of the United States

October Term, 1964

No. 1056

EMILIUS AUGUST TJONAMAN,

Petitioner,

against

A/S GLITTRE and FEARNLEY & EGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Question Presented	3
The Facts	3
Argument:	
Point I—The remedial benefits of the Jones Act and the General Maritime Law of the United States should be applied in pari materia to the case at bar in line with our congressional policy.	
Petitioner does not claim that he is entitled to the protection of the Jones Act, but when General Maritime Law is relied upon the Jones Act may be looked into as to congressional intent	5
Poin II—The law of the flag should not be applied in the instant case	6
Point III—The petitioner cannot obtain just redress for his injuries in any other form or by the application of foreign law point	7
Point IV—Norway neither in fact nor in law exercises any relationship or contact with the internal affairs of the vessel or the business of its owner except technically	7
Point V—Provisions of General Maritime Law may not be denied on the basis of foreign law	9
Point VI—The holding in the case of Lauritzen v. Larson, supra, is not controlling in the instant case	10
Conclusion	12

PAGE

APPENDIX:

Decree Appealed From 13

Opinion of the United States Court of Appeals for the Second Circuit 14

Cases Cited

Banco Nacional De Cuba v. Sabbatino, 27 F. R. D. 255 (1961) 9

Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437, cert. denied, 359 U. S. 1000 6

Bilbao v. M/S Ciudad De Ibaque, 129 F. Supp. 725.. 11

Blanco v. Phoenix Compania De Navegacion, S. A., 304 F. 2d 13 (1962) 9

Caribbean Federation Lines v. Dahl, 315 F. 2d 370 (1963) 11

Catherall v. Cunard S.S. Co., 101 F. Supp. 230 11

Conte v. Rio De La Plata, 169 F. Supp. 164 (1959).. 11

Hilton v. Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895) 9

Lauritzen v. Larsen, 345 U. S. 571, 73 S. Ct. 921 ...6, 7, 8, 10

Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 280 N. Y. 286, 20 N. E. 2d 758 (1939), aff'd 309 U. S. 624, 60 S. Ct. 725, 84 L. Ed. 986 (1940) 9

Nakken v. Fearnley & Eger, 137 F. Supp. 288 9

Pavlou v. Ocean Traders Marine Corporation, 211 F. Supp. 320 (1962) 6, 10

Romero v. International Terminal Operating Co., et al., 358 U. S. (1958) 8, 11

Savelis v. Vlachos, 137 F. Supp. 389 11

Smith v. Furness Withy & Co., Ltd., 119 F. Supp. 369 8

PAGE

Stewart v. Pacific Steam Navigation Co., 3 F. 2d 329 (1924) 5
Strathearn Steamship Co. v. Dillon, 252 U. S. 348, 40 S. Ct. 350 11

The Fletero v. Arias, 206 F. 2d 267 11
The Memphian, 245 F. 484 (D. C. Mass. 1917) 11
The M/V Tunous v. Skovgaard, 358 U. S. 588, 79 S. Ct. 503 11
The Roseville, 11 F. Supp. 150 (D. C. Wash. 1935) .. 11

Statutes Cited

General Maritime Law 5

Jones Act 5

28 U. S. C. 1254(1) 1

Supreme Court of the United States

October Term, 1964

No.

EMILIUS AUGUST TJONAMAN,

Petitioner,

against

A/S GLITTRE and FEARNLEY & EGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its order and judgment entered the 11th day of January 1965.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 340 F. 2d 290.

The opinion of the United States District Court for the Southern District of New York (Cooper, U.S.D.J.) is unreported and is set forth at page 4a of petitioner's appendix in the Court below.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated January 11, 1965 and was entered January 11, 1965.

This Court has jurisdiction under 28 U.S.C. 1254(1).

Statement

This suit was originally brought by petitioner to recover damages for personal injuries sustained by him on March 14, 1958 while he was serving as a member of the crew of the M.S. Ferngrove, a vessel owned and operated by the respondents.

By order of Hon. DUDLEY B. BONSAL, United States District Judge, dated June 29, 1962, with the consent of counsel, the action was transferred from the Civil Jury Calendar to the Admiralty Calendar and the caption amended to reflect this change.

On June 20, 1963, it was stipulated and agreed that the trial was to be conducted in two stages, the first stage encompassing solely the question as to what substantive law was to be applied to petitioner's cause of action against respondents, that is, whether the general maritime law of the United States or the law of the Kingdom of Norway.

After a decision had been rendered on this first stage, the second stage of the trial would commence, which stage would relate to the issues of liability, injuries and damages under whatever law the Court had previously found to be applicable.

After hearing arguments of counsel, and after having considered briefs on the law submitted by both parties, the Court decided, in an opinion read from the bench on April 23, 1963 that the Norwegian law was to be applied. An exception was duly noted to the Court's ruling.

On May 21, 1963, the Court, from the bench, granted respondents' motion to dismiss the libel on the merits, after libelant conceded that he had no cause of action under Norwegian law.

Questions Presented

1. After jurisdiction is established in a Federal Court of the United States, are the laws of the United States, the General Maritime Laws, or the laws of the country of the flag of the ship controlling, each to the exclusion of the others, or are they to be considered in pari materia in the trial of a maritime cause of action between aliens absent a common forum?

2. In the trial of a maritime cause of action between aliens absent a common forum, which of the following criteria is the proper standard to be applied if they do not lend themselves to be considered in pari materia:

a. The laws of the United States

b. The General Maritime Laws

c. The laws of the country of the flag of the ship?

The Facts

Prior to the first stage of the trial, counsel for the parties stipulated that the following set of facts should govern the determination as to whether petitioner was or was not entitled to the protection of United States laws.

1. Petitioner was born in Dutch Guiana on April 1, 1932, and was at all times referred to in this suit a Dutch national.

2. On January 17, 1958, petitioner became a legal resident-alien in the United States.

3. Respondent A/S Glittre was at all times referred to in this suit a Norwegian corporation and the owner of M/S Ferngrove, a Norwegian flag dry cargo vessel, duly registered in Oslo, Norway.

4. Respondent Fearnley & Eger was at all times referred to in this suit a Norwegian partnership and the managing owner of M/S Ferngrove.

5. On February 14, 1958, petitioner obtained employment in New York as a motorman aboard M/S Ferngrove through the offices of the Norwegian Seamen's Union and the Scandinavian Shipping Office, Inc.

6. On February 14, 1958, petitioner signed standard form Norwegian shipping articles in the office of the Norwegian Consulate General in New York. A photostatic copy of the articles signed by appellant (entitled "Hyrekontrakt") and an English translation thereof is annexed hereto and marked exhibits "A" and "B" respectively.

7. Petitioner had been a member of the Norwegian Seamen's Union for approximately two years prior to serving aboard M/S Ferngrove.

8. Petitioner had served aboard other Norwegian vessels as well as aboard Panamanian and Liberian vessels, but had never served aboard U.S. flag vessels prior to February 14, 1958.

9. Petitioner served as a motorman aboard M/S Ferngrove from February 14, 1958 until March 14, 1958 at which time he sustained an injury while in the engineroom of M/S Ferngrove during the course of his employment.

10. On March 14, 1958, M/S Ferngrove was in the Port of Takoradi, Ghana, West Africa.

ARGUMENT

POINT I

The remedial benefits of the Jones Act and the General Maritime Law of the United States should be applied in *pari materia* to the case at bar in line with our congressional policy.

Petitioner does not claim that he is entitled to the protection of the Jones Act, but when General Maritime Law is relied upon the Jones Act may be looked into as to congressional intent.

Judge LEARNED HAND, in clear and concise language set forth Congressional policy in the case of *Stewart* v. *Pacific Steam Navigation Co.*, 3 F. 2d 329 (1924).

> "There is no indication of any purpose to limit it to United States corporations, and it would be highly unreasonable to impute any such purpose to Congress, for the result would be, not only to deprive American seamen of the protection which the Act was meant to give them when serving on foreign ships, *but to give advantage to such ships as against American ships. We all know that the purpose of Congress was directly the opposite.*" (Emphasis supplied.)

Respondents are doing business here in the same manner and to the same extent as any other American steamship company utilizing the American corporation, Fearnley & Eger, Inc. as a medium of doing business in the United States.

The respondent obviously does a great deal of business in the State of New York and utilizes the services of Fearnley & Eger, 39 Broadway, New York, New York, as its regular agent in connection with its shipping business.

The respondents were operating their vessels in direct competition with vessels flying the American flag. *Pavlou* v. *Ocean Traders Marine Corporation,* 211 F. Supp. 320 (1962).

POINT II

The law of the flag should not be applied in the instant case.

Although a great deal of emphasis has been placed on "the law of the flag," this is not always the determinative factor in deciding which substantive law to apply in a particular case.

Approximately 5 years after the Supreme Court's decision in *Lauritzen* v. *Larsen,* 345 U. S. 571, 73 S. Ct. 921, the United States Court of Appeals for the Second Circuit decided the case of *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437, cert. denied, 359 U. S. 1000. The Court stated, at page 440, as follows:

> "Thus the Jones Act has often been applied although the 'flag of the ship' was foreign. E.g., Uravic v. F. Jarka Co., 1931, 282 U. S. 234, 51 S. Ct. 111, 75 L. Ed. 312; Gerradin v. United Fruit Co., 2 Cir., 1932, 60 F. 2d 927, certiorari denied 287 U. S. 642, 53 S. Ct. 92, 77 L. Ed. 556, Gambera v. Bergoty, 2 Cir., 1942, 132 F. 2d 414, certiorari denied 1943, 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699. Ownership of the vessel by American citizens was also lacking in the Uravic and Gambera cases."

The Court, in the *Bartholomew* case, *supra,* interpreting the Supreme Court's ruling in *Lauritzen* v. *Larsen, supra,* held that "* * * in a particular case something between minimal and preponderant contacts is necessary if the Jones Act is to be applied. Thus, we conclude that the test is that 'substantial' contacts are necessary." General Maritime Law requires less persuasion to be invoked in the

instant case. Both the provisions of the Jones Act and those of the General Maritime Law should be available to libelant to further the American concept of fair and substantial justice.

The application of foreign law would be tantamount to a denial of justice in the instant case.

POINT III

The petitioner cannot obtain just redress for his injuries in any other forum or by the application of foreign law.

The *Lauritzen* case, *supra,* and subsequent cases applying the law of the flag have done so on the basis that justice could best be served by relegating the parties to a common forum but never where the law of the flag was in such conflict with the law of the United States and the adoption of the law of the flag would result in a miscarriage or denial of justice.

Furthermore in the instant case there is no common forum to which the parties can be referred and the contacts with the United States are such as to warrant the application of United States law.

POINT IV

Norway neither in fact nor in law exercises any relationship or contact with the internal affairs of the vessel or the business of its owner except technically.

In the case at bar, the contacts with the United States are such as to warrant the application of the United States law.

The only contacts with the Kingdom of Norway existing in this case are the Norwegian flag of the vessel and the nationality of the owner.

Balanced against these factors are following:

1. Petitioner, although a Dutch national, was a legal resident-alien of the United States.

2. The petitioner signed on the vessel in New York, which was the usual port from which he shipped.

3. The respondents maintained a regular operating agent in New York, Fearnley & Eger, 39 Broadway, New York, which husbanded the vessel.

4. The respondents did and now do a substantial amount of business in the Port of New York, and for this purpose maintain the firm of Fearnley & Eger as general agent here.

5. Respondents are competing directly with American flag shipping.

Although the courts have considered the various factors as laid down by Mr. Justice JACKSON in *Laurtizen* v. *Larsen, supra,* the cases declining the application of American law can be distinguished on their facts from the instant case.

In most of the leading cases, the libelant and respondent were of the same nationality as the flag flown by the vessel.

In *Lauritzen* v. *Larsen, supra,* a Danish seaman was injured on a Danish ship, owned by a Danish ship owner.

In *Romero* v. *International Terminal Operating Co., et al.,* 358 U. S. 1958, the plaintiff was a Spanish seaman who had signed articles in Spain and was injured on board a Spanish ship, owned by a Spanish corporation.

In the case of *Smith* v. *Furness Withy & Co., Ltd.,* 119 F. Supp. 369, the plaintiff was a British subject, who was

injured on board a British flag vessel, owned by British interests while the vessel was in Bermuda.

In *Nakken* v. *Fearnley & Eger,* 137 F. Supp. 288, the libelant was a Norwegian citizen who had brought suit against the Norwegian owners of a vessel which flew the Norwegian flag.

All of these cases applying the law of the flag generally did so on the basis that all parties and the flag of the vessel were the same nationality.

POINT V

Provisions of General Maritime Law may not be denied on the basis of foreign law.

The controlling decisions in this country have made it manifestly clear that any foreign law which tends to limit or deny provisions of general maritime law to any seaman will be construed as being against public policy and thereby void.

As recently as May 23, 1962, Chief Judge SOBELOFF, in the case of *Blanco* v. *Phoenix Compania De Navegacion, S.A.,* 304 F. 2d 13 (1962), stated at page 15:

> "Moreover, certain decisions go further, strongly indicating that any attempt whatever by a ship to limit its liability to a seaman under the General Maritime Law is against public policy and ipso facto void, irrespective of the fairness of the terms of the agreement."

The effect to be given to foreign law is determined by local law.

Banco Nacional De Cuba v. *Sabbatino,* 27 F. R. D. 255 (1961); *Hilton* v. *Guyot* (1895), 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95; *Moscow Fire Ins. Co.* v. *Bank of New York &*

Trust Co. (1939), 280 N. Y. 286, 303, 20 N. E. 2d 758, affirmed by an evenly divided court, 1940, 309 U. S. 624, 60 S. Ct. 725, 84 L. Ed. 986.

POINT VI

The holding in the case of *Lauritzen* v. *Larsen, supra* is not controlling in the instant case.

The decision by Judge CROAKE in the case of *Pavlou* v. *Ocean Trades Marine Corporation,* 211 F. Supp. 320 (1962), pointed out the extent to which the holding in the *Lauritzen* v. *Larsen, supra,* was not controlling in a factual situation similar to the instant case (p. 325):

> "This court recognizes that the factor of base of operations was not emphasized by the Supreme Court in Lauritzen v. Larsen, 348 U. S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953). However, the court does not interpret that decision as an attempt by the Supreme Court to exhaust the factors which may be relevant. It is clear that there the court was only dealing with the circumstances which were present therein. Indeed, in the Bartholomew case, supra, at page 443 of 263 F. 2d, the Court of Appeals of this Circuit interpreted the Lauritzen decision in this way. Further, persuasive authority exists to support the view that the base of operations of the persons directing the operations of the vessel is a factor making the Jones Act applicable. In Southern Cross Steamship Co. v. Firipis, 4 Cir., 285 F. 2d 651 (1960), the court considered circumstances analogous to the instant case. The Court held then that where the owning corporation employed a general agent based in New York who directed the operations of the vessel, the Jones Act was applicable, in spite of the fact that 80% of the stock of the owning corporation was held by Greek citizens. It follows, therefore, that in cases such as this where the business connections with the country where the ship is registered and the place of incorporation of the owning corporation are minimal, an analysis of the

> base of operations of those who actively manage and direct the vessel is a more meaningful approach to the solution of this problem."

Our courts have always protected foreign seamen against injustice or denial of substantial rights.

The Roseville, D. C. Wash. 1935, 11 F. Supp. 150; *The Memphian,* D. C. Mass. 1917, 245 F. 484; *Caribbean Federation Lines* v. *Dahl* (1963), 315 F. 2d 370.

Judge McGOHEY *in Conte* v. *Rio De La Plata* (1959), 169 F. Supp. 164, stated at page 165:

> "The wage claim is clearly within the court's jurisdiction. In light of this and the other circumstances herein disclosed, sound discretion seems to me to require that jurisdiction be retained of all other claims asserted in the libel."

See: *The Fletero* v. *Arias,* 206 F. 2d 267; *Romero* v. *International Terminal Operating Co., supra; The M/V Tunous* v. *Skovgaard,* 358 U. S. 588, 79 S. Ct. 503; *Strathearn Steamship Co.* v. *Dillon,* 252 U. S. 348, 40 S. Ct. 350; *Bilbao* v. *M/S Ciudad De Ibaque,* 129 F. Supp. 725; *Savelis* v. *Vlachos,* 137 F. Supp. 389.

Judge IRVING R. KAUFMAN in the case of *Catherall* v. *Cunard S.S. Co.,* 101 F. Supp. 230, said at page 234:

> "Assuming the incorrectness of a trial, at law, of maintenance and cure, the cause could undoubtedly be brought on the admiralty side of the court. The district courts may take judisdiction in admiralty of maritime controversies between foreigners."

CONCLUSION

A Writ of Certiorari should issue to the United States Court of Appeals for the Second Circuit to review its judgment herein and on such review being granted, petitioner respectfully prays for an order of this Court reversing the said judgment.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

APPENDIX

Decree Appealed From

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of January one thousand nine hundred and sixty-five.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

EMILUS AUGUST TJONAMAN,
Libelant-Appellant,

v.

A/S GLITTRE and FEARNLEY & EGER,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO
Clerk

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 103, Docket 28337.

Argued Oct. 22, 1964.

Decided Jan. 11, 1965.

EMILIUS AUGUST TJONAMAN,
Libelant-Appellant,

v.

A/S GLITTRE and FEARNLEY & EGER,
Respondents-Appellees.

Before:

FRIENDLY, KAUFMAN and ANDERSON, *Circuit Judges.*

ANDERSON, *Circuit Judge*:

On February 14, 1958 the libelant, Emilius August Tjonaman, a Dutch national, who had become a legal resident-alien in the United States twenty-nine days before, signed on as a member of the crew of M/S Ferngrove, a Norwegian owned and registered vessel. He was, and had been for about two years, a member of the Norwegian Seamen's Union, and it was through that organization and Scandinavian Shipping Office, Inc. that he obtained his berth on the ship. He signed the standard form of Norwegian shipping articles in the office of the Norwegian Consulate General in New York. The articles provided, among other things, that Tjonaman's rights and duties were those "stipulated in Norwegian legislation."

One month later, the libelant was injured aboard the vessel while it was in Ghanian waters. He sued in the United States District Court under the provisions of the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1952), and the general maritime law of the United States. During the course of the trial, he withdrew his Jones Act suit, but adhered to his claims under the general maritime law. The respondents countered with the assertion that it was not the law of this country, but the substantive law of Norway which applied to the case. The parties stipulated that at the trial there would first be heard and determined, on an agreed set of facts, the issue of whether United States or Norwegian law governed, and that thereafter they would be heard on the merits. On the first issue the district court ruled that Norwegian law applied. Whereupon the libelant conceded that he had no cause of action under Norwegian law, and the court ordered the libel dismissed on the merits. No testimony was offered as to the circumstances of the injury or as to the substantive provisions of Norwegian law. The sole question presented on this appeal is whether or not the court below was correct in deciding that Tjonaman could not invoke the general maritime law of the United States. We decide that the district court was correct and affirm the decision.

In *Lauritzen* v. *Larsen*, 345 U. S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953), *the Supreme Court listed seven factors* which, it said, were generally conceded to influence the choice of law to govern maritime tort claims. They were: the place of the wrongful act; the law of the flag; the national allegiance or domicile of the injured seaman; the national allegiance of the shipowner; the place of contract; the inaccessibility of a foreign forum; and the law of the forum. The Court discussed the weight to be accorded each of them and concluded that three were of particular significance; the law of the flag, the national allegiance of the shipowner, and the allegiance or domicile of the injured

seaman. The Court said that "cardinal importance" was to be attached to the law of the flag. In discussing the facts of the case before it, the Court commented that " * * * the weight given to the ensign overbears most other connecting events in determining applicable law" and that it "must prevail unless some heavy counterweight appears." Lauritzen v. Larsen, supra, 345 U. S. at 585-586, 73 S. Ct. at 930. This was a restatement of the settled American principle that the law of the flag controls matters relating to the internal economy or discipline of the ship. Cunard Steamship Co. v. Mellon, 262 U. S. 100, 123, 43 S. Ct. 504, 67 L. Ed. 894 (1923); Restatement, Conflict of Laws, § 405 (1954 Supp.).

Although Lauritzen v. Larsen, supra, involved a claim under the Jones Act, the Supreme Court expressly adopted its reasoning for adjudicating claims under the general maritime law in Romero v. International Terminal Operating Co., 358 U. S. 354, 382, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959). See generally, Currie, "The Silver Oar and All That: A Study of the Romero Case," 27 U. Chi. L. Rev. 1, 72 (1959); Note, "Admiralty and Choice of Law: Lauritzen v. Larsen Applied," 47 Va. L. Rev. 1400 (1961); Note, 36 Tul. L. Rev. 319 (1962).

The present case is readily distinguishable from the "flag of convenience" cases where the foreign registration is only nominal and the vessel belongs to the nation of the flag it flies only for the purpose of avoiding the shipping laws of the United States. Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437 (2d Cir.), cert. denied, 359 U. S. 1000, 79 S. Ct. 1138, 13 L. Ed. 2d 1030 (1959); Southern Cross Steamship Co. v. Firipis, 285 F. 2d 651, 84 A. L. R. 2d 895 (4th Cir. 1960), cert. denied 365 U. S. 869, 81 S. Ct. 903, 5 L. Ed. 2d 859 (1961); Carroll v. United States, 133 F. 2d 690 (2d Cir. 1943); Gerradin v. United Fruit Co., 60 F. 2d 927 (2d Cir. 1932), cert. denied 287 U. S. 642, 53 S. Ct. 92, 77 L. Ed. 556 (1933).

Opinion of the United States Court of Appeals for the Second Circuit

In Bartholomew this court, however, not limiting itself to flag of convenience cases, broadly discussed a method of approach for deciding whether a seaman's claim is governed by the laws of the United States or by the laws of some other nation. The method called for the weighing and evaluating of the factors which consist of the contacts "between the transaction involved in the case and the United States and then deciding whether or not they are substantial." This has been interpreted as limiting the dominating importance of the law of the flag to cases with facts practically identical to the Lauritzen case. Brillis v. Chandris (U. S. A.) Inc., 215 F. Supp. 520, 522 (S. D. N. Y. 1963); Pavlou v. Ocean Traders Marine Corporation, 211 F. Supp. 320, 324 (S. D. N. Y. 1962); 47 Va. L. Review 1400 (1961).

Since the Bartholomew decision the Supreme Court has re-emphasized the paramount importance of the law of the flag. McCulloch v. Sociedad Nacional etc., 372 U. S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963). This leaves no doubt that the starting point for weighing and evaluating of factors is consideration of that law. The Court said, in Lauritzen, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag."

The ultimate issue, then, is whether the substantiality of other existing factors establishing a connection with the United States is sufficient to outweigh the "venerable and universal rule."

In marshaling the pertinent factors in the present case to consider the substantiality of those in support of the libelant's claims, we have before us the facts that the libelant had been for twenty-nine days a resident-alien in the United States, that he signed the articles in New York, that the M/S Ferngrove was frequently in and out of the Port of New York and that the owner, respondent A/S Glittre, maintained a general agent there.

The respondents, on the other hand, call attention to the facts that the libelant is a Dutch national, who had been for approximately two years a member of the Norwegian Seamen's Union, through which he procured a berth on a Norwegian owned and registered vessel, that he signed Norwegian shipping articles in the office of the Norwegian Consulate General in New York and agreed in the written articles that his rights and duties would be those stipulated by Norwegian law, that the libelant suffered the injury, on which he sued, on the vessel while it was in the Port of Takoradi, Ghana and that at no time had he prior thereto served as a crew man on a United States flag vessel.

The only factors in this case which are different from those in Lauritzen are (1) that the libelant's nationality was different from that of the vessel and (2) that he was an alien resident of the United States. Neither of these separately or in combination are sufficient to endow him with rights which substantially all of his shipmates do not have—particularly when he had joined a Norwegian union and signed Norwegian shipping articles. Smith v. Furness, Withy & Co., 119 F. Supp. 369 (S. D. N. Y. 1953).

The trial court, after considering the importance and significance of the factors present in the case, decided that the libelant had "failed to show sufficient factors to justify the application of American law instead of the law of the flag." We agree.

The judgment is affirmed.